SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
DRB 12-046 (District
Docket No. XIV-2011-0557E),
DRB 12-080 (District
Docket No. XII-2009-0004E), and
DRB 12-092 (District Docket
No. XII-2010-0035E)

IN THE MATTERS OF	:
BEN W. PAYTON	:
AN ATTORNEY AT LAW	:

Decision

Argued: April 19, 2012

Decided: August 15, 2012

John P. Dolin and Karen E. Bezner appeared on behalf of the District XII Ethics Committee.

Queen E. Payton appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

These three matters were before us on a recommendation by the District XII Ethics Committee (DEC) that respondent receive two concurrent six-month suspensions in District Docket Nos. XII-2009-0004E and XII-2010-0035E and a certification of the

record filed by the Office of Attorney Ethics (OAE) in Docket No. XIV-2011-0557E. The three matters have been consolidated before us for the purposes of imposing a single form of discipline for the totality of respondent's conduct. We address the issue of the appropriate measure of discipline, a three-month suspension, at the conclusion of our findings in all three matters.

Respondent was admitted to the New Jersey bar in 1992. He has a significant ethics history. On October 27, 1997, he was admonished for gross neglect, lack of diligence, and failure to communicate with the client in one matter. In the Matter of Ben W. Payton, DRB 97-247 (October 27, 1997).

On March 7, 2001, respondent was reprimanded for gross neglect, failure to communicate with the clients, and failure to cooperate with the investigation of two grievances. In re Payton, 167 N.J. 2 (2001).

On June 22, 2001, respondent was suspended for three months for gross neglect, lack of diligence, failure to communicate with clients, failure to set forth, in writing, the basis or rate of his fee, and recordkeeping deficiencies. That matter proceeded on a default basis. In re Payton, 168 N.J. 109 (2001).

On April 30, 2002, respondent was again suspended for three months, for failure to communicate with a client and to set forth, in writing, the basis or rate of his fee. In re Payton, 172 N.J. 34 (2001). The suspension ran concurrently with the June 22, 2001 three-month suspension, with an effective date for both matters of July 17, 2001. On December 26, 2002, respondent was reinstated to the practice of law. In re Payton, 175 N.J. 66 (2002).

Effective February 28, 2011, respondent was temporarily suspended for failure to comply with a fee arbitration determination. In re Payton, 205 N.J. 103 (2011). That suspension remains in effect.

On July 14, 2011, respondent received a censure for stipulated misconduct. Specifically, he admitted having practiced law during a period of ineligibility, from September 28, 2009 to August 18, 2010, for failure to pay the New Jersey Lawyers' Fund for Client Protection (CPF) annual assessment for 2010. According to the stipulation, because of respondent's hospitalization, his financial condition became so dire that he was without sufficient funds to pay the CPF assessment. In re Payton, N.J. (2011).

Respondent has been declared ineligible to practice law seven different times, between 1993 and 2010, for failure to pay the CPF annual assessment.

I. DRB 12-080 - The Church of the Good Shepherd Matter – District Docket No. XII-2009-0004E

A two-count complaint charged respondent with having violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4, presumably (b) (failure to keep the client reasonably informed about the status of the matter and to promptly comply with reasonable requests for information), RPC 1.5(b) (failure to set forth in writing the rate or basis of the attorney's fee), and RPC 1.1(b) (pattern of neglect).

The Reverend Frank Portee, III, pastor of the Church of the Good Shepherd United Methodist of Burlington, the grievant, testified that a contractor, Azcon, had built an addition onto the church and that, under a settlement of the dispute with the church, Azcon had agreed to pay all subcontractors. When Azcon failed to do so, a subcontractor, Greyson, obtained a judgment against the church for $21,892 and sought to levy against the church bank account, which held about $25,000. All of that took place before Portee's arrival as the new church pastor.

On June 13, 2007, the bank notified the church that it had put a hold on the church funds for two years, pending its receipt of an order of the court to turn over the funds.

In July 2007, the church retained respondent to halt an imminent bank levy on the church bank account. With regard to the charge that respondent had not set forth in writing the rate or basis of his fee, Portee conceded that, contrary to that charge, respondent had done so and that he had seen the fee agreement in the normal course of his activities as pastor. By letter dated July 23, 2007, respondent set forth the flat fee required for the representation, $2,250. In fact, respondent's letter refers to the $2,250 as a "retainer" for legal services in the matter. The church then sent respondent a July 30, 2007 letter and a check for $2,250.

According to Portee, a motion had been scheduled for August 17, 2007 for the turnover of the levied funds. The presenter showed Portee an August 15, 2007 letter from respondent to the court indicating his retention and requesting oral argument. Portee did not recall seeing that letter previously. He testified that he did not know why respondent waited until two days before the return date of the motion to send it. He also

felt that the letter alone was insufficient to convey the church's objection to the turnover of the funds.

Portee was asked about respondent's March 22, 2009 reply to the grievance, in which respondent stated that the motion was actually heard on August 23, 2007. Portee did not recall respondent ever having told him that he made a court appearance on that date, but recalled respondent telling him about his attendance "at the hearing related to the subcontractor and, and [sic] that we lost the judgment, which meant that those funds had to be released."

Portee was disappointed that respondent had not advised him about the return date of the motion beforehand because, "obviously, we wanted to be a part of it."

Thereafter, Portee and respondent settled on another strategy, namely, to try to enforce a stipulation in lieu of judgment executed by the church and Azcon, which contained a clause holding the church harmless from the claims of any subcontractors, including Greyson. Toward that end, respondent sent the church a summary of estimated litigation costs, which included two complaints at $200 apiece, a corporate search ($190), and costs, for a total of $850. Portee recalled that the church paid respondent the additional amount.

On November 12, 2007, respondent filed a document in Superior Court, titled Enforcement of Stipulation in Lieu of Judgment, which Portee did not review. He recalled, however, giving respondent access to the prior church attorney's file, in order for respondent to initiate the enforcement action.

Thereafter, according to Portee, he heard nothing from respondent about the outcome of the enforcement action. He remembered that he called respondent repeatedly about the status of the case and that respondent did not return his calls.

On December 17, 2007, respondent filed a five-count complaint against numerous defendants, seeking various forms of relief, including $250,000 from the defendants. According to Portee, respondent never showed him the complaint, prior to filing it. Portee never approved its filing, noting that he might not have approved counts against the prior attorney.

Regarding communications with respondent, Portee testified that respondent met with church officials, at the church, on about three occasions, two of which were in 2007. The initial meeting had to do with the levy. The second meeting involved legal strategy going forward "after the judgment." A third meeting dealt with respondent's review of church files.

Portee complained that, although they met those three times, respondent was always difficult to reach by telephone. Portee recalled making at least ten telephone calls to respondent's office. A secretary always told him that respondent was "not in" and that she would take a message for him. But respondent did not return those calls. Portee thought it "surprising" that respondent would meet at the church to discuss the case, but not return calls. Portee expected respondent to return his calls, even though they had these occasional meetings. Portee was not asked to provide details about the dates and times that he placed those calls.

Portee also recalled a fourth meeting, which he referred to as respondent's "mea culpa" meeting, "in terms of why he wouldn't be able to do what he said he would do and, you know, just a sad meeting." Portee was not asked to provide a date for that meeting.

Respondent sent Portee a February 4, 2008 letter, attaching what respondent described as a summary of the "Good Shepherd Construction Project," which included names of financial institutions, individuals, and court matters related to the original construction matter, but having nothing to do with the

matter for which respondent was retained. Portee had "no idea" why respondent had sent the letter and its attachments.

On cross-examination, respondent asked Portee if he was aware of any dealings that respondent may have had with a "Mr. Novak," whom respondent described as the attorney for the levying subcontractor, Greyson. Portee denied knowing anything about those dealings.

Respondent also asked Portee if there was another meeting, which respondent attended by teleconference, in March or April 2008. Portee recalled that meeting, because respondent's wife came to the church and respondent attended over the telephone. When respondent asked Portee if that, too, constituted communication, Portee conceded that it did, but countered, "Well, I appreciate you for helping me to recall that particular meeting. The problem is not how many meetings we had. It was the problem that you failed to communicate to us what you were doing on behalf of the Church, whether it was five or eight or six [meetings]." He added that, even including the meeting with respondent's wife present, respondent "never communicated to us what you were doing on our behalf," only "why you have been out-of-pocket."

Respondent also questioned Portee about the extent of the legal work that he performed on behalf of the church. When asked if he thought that respondent had earned his fee, Portee stated:

> Listen, you probably did more than 2,250. I, I -- you know, based on what you knew and based on your research, I would say yes, what you did was probably worth more than 2,250 [sic]. You were probably underpaid for what you were attempting to do, you know. I wouldn't make that argument.
>
> [1T51-21 to 1T52-2.][1]

Portee added, "I think whatever you did was more than what we paid you. What you represented to us that you would do for us was probably less than what you did."

Respondent also asked Portee if he recalled a discussion in which respondent said that he needed "to bring someone else in to help" him with the case. Portee recalled such a discussion.

By May 12, 2008, Portee had such serious reservations about respondent's handling of the church's matter that he wrote a letter imploring respondent to give the church an update on any actions that he may have taken to further the church's claims.

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[1] "1T" refers to the transcript of the 10:50 a.m. September 20, 2011 DEC hearing.

In his December 9, 2008 grievance letter, Portee noted that respondent never replied to that plea for information.

Respondent asked Portee if the matter had been neglected, prior to his involvement. Portee admitted that it had been poorly handled by another attorney, long before Portee's involvement with the church.

At one point during Portee's cross-examination, the panel chair peppered respondent with questions about the date of the motion for the turnover of the church funds, that is, August 17, 2007 or August 23, 2007, as respondent had indicated in his reply to the grievance. Respondent could not recall if he had requested an adjournment of the August 17, 2007 motion date just after his retention, which would have explained his use of the August 23, 2007 date in his reply to the grievance. He was also unable to recall if he had filed any written opposition to the motion or if he had spoken to his adversary before or only at the oral argument, which he recalled had been heard by "Judge Michael J. Hogan," in August or September 2007. About the number of court appearances that he made, respondent testified as follows:

> I believe there was only one court appearance, and that was pertaining to the bank levy, I believe. There may have been

> others. I know there were Complaints and other documents that were sent, but court appearance, I only recall the one in Burlington and that was August or September or so of 2007.
>
> [1T71-12 to 18.]

At one point, the panel chair interjected:

> MS. DACRUZ-MELO [Panel Chair]: Did you have an opportunity to review your file before coming here today?
>
> MR. PAYTON: No, ma'am. I've been sick. I've said that several times. I was in the hospital for 15 days. No, I haven't. I've had major surgery. I've been down. I had a blood count of 94.9. I haven't been able to do much of anything.
>
> [1T89-8 to 16.]

Although respondent was unsure of the date, he recalled "without equivocation" that he had attended the oral argument on that motion for the church and that he had communicated the status of the case to Betty Broadway, the chair of the church council.

The panel chair was surprised to learn at the hearing, for the first time, that respondent's claimed contact person at the church was Broadway, for he had not indicated so in any prior communications with the DEC. In the panel chair's view, Broadway's testimony on the issue of communication was now

essential to a full understanding of the communications between respondent and the church.

According to respondent, as soon as he was retained, he had a conversation with the attorney for the subcontractor:

> MS. MATULA [Panel Member]: Okay. When you were having discussions relating to the settlement of the lien, is it fair to say that the other party did not want to compromise the amount?
>
> MR. PAYTON: Yes. He was, he was in the cat-bird seat, you know. He had the wind at his back, you know. This matter had been litigated and the subcontractor received their judgment. They were at the point where they had contacted the Burlington County Sheriff's Department, so it was really a done deal at that point. All right. So he said, I believe he said he would talk with his client, but he wasn't optimistic that his client would get off the amount of 21,000 that was due and owing.
>
> MS. MATULA: And when was this conversation?
>
> MR. PAYTON: Shortly after I was retained.
>
> MS. MATULA: And did you communicate that with any member of the Church?
>
> MR. PAYTON: Miss Broadway.
>
> [1T72-3 to 1T73-24.]

Respondent recalled that, after filing the complaint, he anticipated "bringing someone else on" to handle the litigation. He was unsure if he would have requested additional legal fees

for himself, but he anticipated that the new attorney would be compensated.

The complaint that respondent filed contained five counts. The first three counts sought damages of $250,000 each from the construction engineer, the architect, and the contractor, Azcon. The fourth and fifth counts were in the nature of a legal malpractice claim for much less, $25,000, against respondent's immediate predecessor attorney for the church, and two law firms where the former attorney had allegedly worked, while representing the church.

Respondent's recollection of the events that took place after he filed the complaint was sketchy. He did not recall if he served the complaint on the defendants or if he took any other action, after filing the complaint, to prosecute the church's claims.

When respondent was asked, at the hearing to check his file for letters that might indicate service or for copies of any answers that the defendants may have filed, he indicated that he had nothing like that with him. He recalled having turned over his file to the church, upon termination of the representation. He asked the panel for an additional ten days to provide whatever documents he had at his office, stressing that he had

just had surgery two weeks before the hearing and was "in a diminished state."

A second ethics hearing date was scheduled, at which time Betty Broadway testified about her experience with the church and the Azcon litigation, as it related to respondent. According to Broadway, she spoke to respondent about five times, over the course of several years. She spent "a lot of time," however, speaking to respondent's secretary, Claudette.

Broadway recalled that her initial conversation with respondent was a meeting, on July 16, 2007, at the time he was being retained. Thereafter, over the next year and a half, she had several more meetings and conversations with respondent. She recalled that, although there were communications between the church and respondent,

> [w]e would get information, but we wouldn't get any follow through. And there was always a gap where we would place calls, and we wouldn't hear from him, and he would come back with some information and ask, did you do X, Y and Z, and he would say yes, but I have to do this and get back to you. And

> then you'd go through that process again of calling and calling to try and reach him.
>
> [3T6-11 to 19.][2]

Broadway recalled calling respondent on his cell phone, at the south Jersey office, and at the north Jersey office. She would leave messages with his secretary, Claudette, who would ask, "Didn't he call you?" Broadway felt that respondent's communications were inadequate and that there were still unanswered questions at the time of the DEC hearing.

Broadway was shown a letter from respondent to the church, dated October 24, 2007, titled "File Summary," which appeared to be a list of items from the file that the church gave respondent to review for his legal work.

The panel chair asked Broadway if either respondent or his secretary had ever given her a status update that she was to relate to Portee or to the church council. She replied that they had not.

In further clarification, Broadway recalled that, from March 2008 until 2009, when respondent ceased working on the

[2] "3T" refers to the transcript of the October 11, 2011 DEC hearing.

church matter, he did not contact the church with information about the case.[3] Moreover, her attempts to reach him were frustrated by his failure to answer his cell phone and by the south Jersey office's failure to answer the phone. She was forced to leave messages with Claudette at the Rahway office. Those conversations were limited to leaving messages for respondent to contact the church with information about the matter.

On cross-examination, Broadway recalled that, after the motion for the turnover of the funds, at which respondent claimed to have made an appearance, respondent "verbally" updated her on the status of the motion. Respondent then pressed Broadway about the period from December 2007 through March 2008, when it was alleged that respondent had failed to communicate with the church. Broadway conceded that respondent's February 4, 2008 letter with a construction project summary attached amounted to a communication, but she explained that it was "just a list of people who have been involved in the building process." Moreover, she saw respondent's October 24, 2007 "File

[3] Respondent's representation actually ended in August 2008.

Summary" as just another list. Neither document contained useful information about any action that respondent might have taken to prosecute the church's claims; neither document could be construed as a status update. Finally, Broadway claimed to have been unaware that respondent had filed a December 2007 complaint for the church.

At the conclusion of the ethics hearing, respondent was asked if, having been given time to do so, he had located any additional documentation regarding his legal services to the church. He first reminded the panel that he had been temporarily suspended from the practice of law, since early 2011, for failing to pay a fee arbitration award and then explained why he had not searched for additional documents:

> Q. [Panel Chair Dacruz-Melo] You haven't been in your office or in any court or signed any pleadings or provided any legal advice?
>
> A. No. I have stopped by my office, I have physically been present. But, as I just stated, I don't have the energy, and I haven't done anything. You know, rather than just staying home, my wife has been going to the office. As I stated, she is also an attorney. And so, just to get out of the house, I would accompany her. But in terms of working, you know, I haven't been able to do anything. And I'd just like to make something fairly explicit, I don't know if I stated it at the last meeting. But the June 2010 hospitalization where I had a cardiac

> arrest, the results of that has [sic] been -- you know, as you probably know, there's a period in which oxygen doesn't get to the brain, and it results in some memory loss. And so I've been trying to -- well, you know, with my doctors to work on that and being anemic has zapped . . . my energy. So with the various health issues, as I said, I would accompany my wife to the office, but I haven't had enough energy. And cognitive, I just haven't been totally there in terms of being able to do anything; not that I would. But those are just health limitations that pretty much has [sic] prevented me from doing anything either physically or professionally.
>
> [3T35-24 to 3T37-1.]

Respondent recalled that, in August 2008, the church had terminated the representation. He promptly turned over his file to the church that same month.

Respondent denied all of the charges in the ethics complaint. In a telling statement, contained in his answer to the ethics complaint, he stated, "respondent deny violation [sic] in that extenuating circumstances existed which precluded his providing the client with more diligent efforts on their behalf."

According to respondent, on February 25, 2008, his wife, Queen Payton, also an attorney, was diagnosed with breast cancer. She underwent five major surgeries and experienced a

"sudden cardiac event requiring stent placements." She then suffered a "devastating systemic infection. She was in and out of the hospital five times between March and July 2008."

As for his own health, respondent attached an affidavit to his answer, outlining his own struggles, beginning in August 2009, with advanced heart disease. Then, in February 2010, respondent was diagnosed with an "aggressive form of [bone] cancer (multiple myeloma)":

> On or about March 10, 2010, I began weekly visits with the hematologist/oncologist (Dr. Bernard Kulper, Avenel, NJ) and began my weekly chemotherapy treatments shortly thereafter. My treatments have continued since that time, but subsequently I changed my oncology doctor to Dr. David Seigel, Hackensack, NJ.
>
> In May 2010, I was hospitalized at JFK Medical Center, Edison, NJ, for severe back strain, which left me unable to walk. I remained hospitalized for 7 days. Upon my discharge, I remained unable to walk or care for myself.
>
> I continued my chemotherapy treatments transported via wheel chair and in severe pain.
>
> On June 22, 2010, I suffered a cardiac arrest, required intubation and remained in intensive care at Virtua Medical Center, Mt Holly, NJ for approximately 10 days. I returned home, but required constant supervision and monitoring for several weeks.

> Since my cardiac arrest, I am unable to stand or walk more than 5-10 feet and must use cane and wheelchair to assist in my transport. I remain severely compromised by my cancer and require blood transfusions almost monthly.
>
> I have been unable to return to a full work schedule and currently work approximately 4 hours per day, 2-3 days per week. In addition, I have some memory and cognitive deficiencies since my cardiac arrest that I must make adjustments for.
>
> [A at Ex.A¶5-¶10.][4]

The DEC found respondent guilty of gross neglect and lack of diligence (RPC 1.1(a) and RPC 1.3, respectively) for 1) his failure to file written opposition to the initial motion for the turnover of funds and 2) his "poor attempt" to put the matter back on track with the filing of a complaint in the Superior Court, prior to which he did not discuss or show the complaint to the client. Thereafter, respondent took no action to prosecute the complaint.

The DEC also found respondent guilty of failing to adequately communicate with the client (RPC 1.4(b)). The panel

[4] "A" refers to respondent's answer to the formal ethics complaint.

report noted that there were communications over the course of the representation, as respondent had stressed in his presentation, but that they were devoid of any useful information about his handling of the case. The failure to communicate with the client went so far as his filing of a complaint without first discussing it or presenting it to the client for review.

The DEC dismissed the charge that respondent failed to memorialize the rate or basis of his fee, citing the written fee agreement that set forth the details of respondent's flat fee. The DEC did not address the RPC 1.1(b) charge (pattern of neglect).

While the DEC acknowledged respondent's claimed mitigation for illness, it noted that he provided no proof of his wife's illness and that his own troubles surfaced well after the grievance was filed, in February 2009.

The DEC recommended the imposition of a six-month suspension (to run concurrently with a recommended six-month suspension in DRB 12-092), and that he practice law under the supervision of a proctor for a period of two years, upon reinstatement. The DEC did not support its recommendation with case law.

Upon a de novo review of the record, we are satisfied that the DEC's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence.

Respondent was retained to represent the church in a matter that was largely doomed by the actions of prior counsel, when respondent became involved (at the latest, July 23, 2007, the date of his fee agreement). Respondent's initial mission was to undo a levy that a subcontractor, Greyson, had placed on a church bank account.

With a motion return date of August 17, 2007, respondent inexplicably waited until August 15, 2007 to notify the court that he represented the church and would request oral argument. He prepared no written opposition to the motion. It is unclear whether the motion was heard that day or a week later, as respondent claimed.

Respondent was adamant that he had attended the oral argument on the motion and that the motion had been denied. There is no reason to dispute respondent's version of events in that regard. Likewise, there is no reason to dispute his claim the he so advised Portee and/or Broadway about the result, as each of those witnesses recalled respondent having discussed the

loss of the "judgment," as Portee called it. The funds were turned over to the contractor in September 2007.

It was not until November 13, 2007, long after the funds were gone, that respondent filed an enforcement of stipulation in lieu of judgment action in Burlington County Superior Court. In it, respondent claimed that Azcon had defaulted on its obligation to hold the church harmless against subcontractors. Apparently, that action was unsuccessful.

On December 17, 2007, respondent filed a complaint against the various defendants, as a last ditch effort to recover funds for the church. Although he discussed with Portee and Broadway the possibility of filing a complaint, he did not show the complaint to either of them or seek their approval before filing it. To make matters worse, he took no action thereafter to prosecute the case. He did not recall serving the complaint or receiving answers from any of the defendants. Likewise, he did not make an effort to search his file for such proofs, despite having been given ample opportunity to do so by the DEC. For all of it, we find respondent guilty of gross neglect (RPC 1.1(a)) and lack of diligence (RPC 1.3).

With regard to the charge that respondent failed to communicate with his client, RPC 1.4(b) requires an attorney to

keep a client reasonably informed about the status of the matter and to reply to the client's reasonable requests for information. Respondent spent a significant amount of time at the hearing establishing the contacts that he and his office had with the church over the course of the representation. It is true that there were meetings and at least one teleconference with church officials. But that only establishes that there was contact, rather than a status report.

Both Portee and Broadway testified that respondent's problem was different. Although there were times when they could not reach him, the more egregious problem was the lack of usable information that he conveyed to them, when he did reach out to the church. Prime examples were the October 24, 2007 "File Summary" and February 4, 2008 "Construction Project Report," neither of which contained information about the status of the case.

After early 2008, although there was virtually no activity by respondent on behalf of the church, he did not alert the church to that fact. Instead, Portee sent him a pointed letter, on May 12, 2008, in which Portee questioned every aspect of the representation and noted his frustration that he and the church were experiencing from not knowing what was happening with the

complaint respondent had discussed filing, months earlier. The evidence is clear that respondent woefully failed to keep his client adequately informed about events in the case, a violation of RPC 1.4(b).

Although the DEC did not address the pattern of neglect charge, gross neglect has been a component of respondent's overall misconduct in at least three of his prior discipline matters, more than sufficient to establish a pattern. For a finding of a pattern of neglect, at least three instances of neglect are required. In the Matter of Donald M. Rohan, DRB 05-062 (June 8, 2005) (slip. op. at 12-16). We find that respondent violated RPC 1.1(b).

On the other hand, the DEC was correct to dismiss the charge that respondent failed to set forth, in writing, the rate or basis of his fee (RPC 1.5(b)), for he did, in fact, utilize a July 23, 2007 written fee agreement.

II. DRB 12-092 - The Lesniak Matter - District Docket No. XII-2010-0035E

The complaint charged respondent with having violated RPC 1.1(a) and (b)(gross neglect and pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4(b)(failure to communicate with the

client), and RPC 8.1(b)(failure to cooperate with an ethics investigation).

Walter A. Lesniak, the grievant, testified that, in 2007, he retained respondent to represent him about a New Jersey Department of Treasury, Division of Taxation, claim in the amount of $16,576.15, for taxes due on cigarettes purchased online.

Lesniak paid respondent $525 and agreed to pay an additional twenty-five percent of any tax savings attributable to respondent's efforts in the matter. According to Lesniak, respondent's secretary promised him a receipt for the check and a fee agreement, but he received nothing.[5]

In 2009, Lesniak received a new tax notice from the State of New Jersey, demanding an additional $10,883.12 in interest and $828.81 in penalties, in addition to the original debt.

When Lesniak contacted the Division of Taxation, he was told that they had received nothing from respondent, including a request for a hearing on his matter.

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[5] Despite the factual allegation that respondent did not provide a fee agreement, he was not charged with a violation of RPC 1.5(b). Likewise the DEC made no finding in that regard.

Lesniak then contacted respondent and scheduled a meeting with him for May 14, 2009, but respondent cancelled that meeting on May 13, 2009. Lesniak recalled respondent telling him that he did not have Lesniak's file because it was over one year old and had been transferred to an offsite storage facility. Respondent needed some time to acquire the file. Respondent told Lesniak that he could meet with him on May 18, 2009 and would contact him, on May 14, 2009, to schedule an exact time for their meeting.

Respondent failed to contact Lesniak on May 14, 2009. Lesniak's efforts to reach him by telephone were unsuccessful. Thereafter, Lesniak sent a May 21, 2009 letter by certified mail, return receipt requested, to respondent's law office, which was returned as "unclaimed."

On June 8, 2009, Lesniak paid the New Jersey tax authorities $22,017.71, which included $5,441.56 in penalties and interest.

After terminating the representation, on January 6, 2010, Lesniak had his new attorney send a letter to respondent, requesting his client's file. By letter dated January 10, 2010, respondent replied that Lesniak's file had been seized in criminal and civil investigations of the owner of a title

insurance company that employed respondent as New Jersey counsel.

The panel chair cross-examined Lesniak about his communication with respondent:

> Q. Mr. Lesniak, did Mr. Payton ever provide an explanation as to why he had not contacted the State of New Jersey?
>
> A. I never got the occasion to meet with him or speak with him after that.
>
> Q. When you first contacted him and you arranged for this meeting, he didn't explain to you why it was that he never did anything?
>
> A. Other than my first appearance at his office with my invoices from the cigarette taxes, I never met or spoke with him. I wasn't able to meet or speak with him ever again.
>
> Q. And why was that?
>
> A. I got put off. Meetings were cancelled, you know.
>
> Q. Did you speak to somebody from his office?
>
> A. Spoke to his wife, Queeny, one time and then his secretary about two or three times.
>
> Q. But you never--
>
> A. Scheduled meetings were always cancelled for whatever reason.

> Q. Payton? You never got to speak to Mr. Payton?
>
> A. Never.
>
> [2T11-19 to 2T12-19.][6]

For his part, respondent testified that he did some work for a title company and had some office space at its Staten Island, New York, location, from August 2003 through September 2008, when the title company went bankrupt. According to respondent:

> Unfortunately, Mr. Lesniak's file, as well as some other files -- when the company closed down we were given about an hour or so to remove our belongings. We were told at approximately 9:15 on September the 25th that the business -- September 25th, 2008 that the company was closing and we were given one hour to remove our belongings, and through the chaos I further learned there were files that were found in a dumpster, client files. There were several other attorneys besides myself who were also at that location, so that is what happened. Unfortunately with Mr. Lesniak's file, in addition to some other of my clients, those files were, were-- I was unable, rather, to retrieve those files. I don't know if they were part of the files that the D.A. found in the dumpster, but that was the

[6] "2T" refers to the transcript of the 9:30 a.m. September 20, 2011 DEC hearing.

> disposition, unfortunately, of Mr. Lesniak's file. When that company shut down we were given an hour to leave the premises, and as I say, I told [the new attorney] that.
>
> [2T14-21 to 2T15-16.]

As a result, after September 25, 2008, respondent no longer had Lesniak's file. On further cross-examination, respondent was asked if he recalled at the time that Lesniak was a client. He had no specific recollection in this regard. Respondent recalled having been told that, at some point, they would be allowed back into the office building, but that never happened:

> As I say, the D.A. was bringing charges against the president of that company and we were, we were barred from returning inside. Some of the title insurance companies, they came there to retrieve their files and money, etcetera, etcetera. To answer your question, I pretty much got my belongings that were on top of the desk as quickly as I could, because we were given a deadline of one hour, so I didn't have a specific, at that time a specific recollection with regards to Mr. Lesniak's file. I wish I had, but at that time I did not.
>
> [2T19-17 to 2T20-3.]

When asked if he ever tried to obtain his files from the D.A., Lesniak's among them, respondent conceded that he had not done so. Respondent admitted that, after his files were seized, on September 25, 2008, he made no effort to contact Lesniak to

reconstruct the file from documents that Lesniak would have still had in his possession. Respondent acknowledged that he performed no further legal services on the matter and made no attempt to contact Lesniak from September 25, 2008, the date of the "raid," until over a year later, when Lesniak retained new counsel.

As to his cancelled appointments with Lesniak, respondent stated, "Again, ma'am, I'm, I'm, I'm not sure. This is one of the reasons that I didn't cross examine Mr. Lesniak, because with the medication and everything that's been going on, my recollection isn't that clear . . . . I just don't recall."

With respect to any actual work performed on the matter, respondent recalled that, in 2008, he researched the taxation of online cigarette sales and discovered that the New Jersey Assembly had not yet passed a law requiring the collection of taxes on those sales "and that's what his matter involved." Respondent conceded, however, that he never acted in any way on that knowledge. He never even sent the State a communication indicating that he represented Lesniak in the tax matter.

In closing, respondent stated,

> Well, I guess by way of closing statement, I would state with a high degree of confidence that but for the, the seizing of the

> building where my office was located, that [sic] Mr. Lesniak's work as well of that of others, as I indicated, I felt confident that we would get a satisfactory disposition, and I remain firm on that, and but for the seizure of that building at that time, that I probably would have been able to get his case to a conclusion probably by the end of 2008. I also say with a high degree of remorse that, in hindsight, I should have retained, or especially given my wife limited availability, my wife and partner, limited availability, that it would have been the prudent thing to do, to get a colleague or someone at least to handle those files, but without trying to -- as Mr. Dolin said, mitigating factors, without trying to excuse anything, it's just the reality of what was going on, what I was going through, you know. You can look at it in one way, but you can't really anticipate with any degree of certainty how you're going to react to various things, and I did the best that I could in light of the those challenges, and my wife, also, again, in light of those challenges. It wasn't -- it's not something that if I had to face all over again, that I would go about it in the same way. By way of closing, it's just that I wish I knew now what I knew back then, when this thing first came about. I would have certainly taken a different course of action.
>
> [2T49-23 to 2T51-4.]

In mitigation, respondent presented the same medical evidence of his and his wife's health issues, as was presented in DRB 12-080 (the Church of the Good Shepherd matter).

The DEC found respondent guilty of engaging in a pattern of neglect and lack of diligence (RPC 1.1(b) and RPC 1.3, respectively), because respondent accepted a $525 fee to assist Lesniak with a New Jersey sales tax issue, but took no action thereafter to reduce his client's tax liability. The DEC did not describe the pattern by specifying the other instances of gross neglect.

The DEC also found respondent guilty of failing to communicate with the client (RPC 1.4(b)), for his nearly two-year refusal to communicate with Lesniak, who was attempting to reach him during that time.

The DEC dismissed the RPC 8.1(b) charge (failure to cooperate with ethics authorities), noting that respondent had sufficiently explained the delay in his initial reply to ethics authorities, after which he cooperated by filing an answer.

The DEC recommended a six-month suspension, to be served concurrently with the six-month suspension that it recommended in DRB 12-080 (the Church of the Good Shepherd matter), and a proctor for two years. The DEC did not support its recommendation with case law.

Upon a de novo review of the record, we are satisfied that the DEC's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence.

Respondent was retained to handle a tax issue that Lesniak faced over his online purchase of cigarettes. On February 5, 2007, Lesniak paid respondent a $525 fee. Yet, respondent took no action thereafter on Lesniak's behalf. At that point, Lesniak owed $16,576.15 to the State.

Respondent recalled researching the matter, but he never filed an appearance with the tax authorities or requested a hearing on the tax issue.

Two years later, on February 7, 2009, Lesniak received a demand for $10,883.12 in additional interest and $828.81 in penalties, on top of the original $16,576.15 owed. On June 9, 2009, Lesniak paid the State $22,017.71, which included over $5,400 in penalties and interest. He later retained another attorney to represent him.

For all of it, respondent is guilty of gross neglect and lack of diligence, violations of RPC 1.1(a) and RPC 1.3, respectively.

With regard to communication between respondent and the client, Lesniak testified that, after his initial meeting with

respondent, in 2007, he was unable to speak with him for two years, although he made repeated attempts to do so. He recalled one telephone conversation with respondent's wife, Queen, but she told him nothing that updated him about the status of his matter.

He was finally able to reach respondent in May 2009, when the two set up a meeting, which respondent promptly cancelled. Lesniak immediately sent a certified letter to respondent's law office, which was returned to him, unclaimed.

By ignoring his client's reasonable requests for information over the course of the representation, leaving him totally in the dark about his matter, respondent is guilty of violating RPC 1.4(b).

The DEC correctly dismissed the RPC 8.1(b) charge. Respondent explained his delay, replied to the grievance, filed an answer, and participated at the hearing.

III. DRB 12-046 The Mason, Griffin & Pierson Matter – District Docket No. XIV-2011-0557E

This matter was before us on a certification of default filed by the Office of Attorney Ethics, pursuant to R. 1:20-4(f). The complaint charged respondent with having practiced law

while suspended (R. 1:20-16(i)), conduct involving dishonesty, fraud, deceit or misrepresentation (RPC 8.4 (c)), and conduct prejudicial to the administration of justice (RPC 8.4(d)).

Service of process was proper in this matter. According to the OAE certification of service, on December 19, 2011, the OAE sent a copy of the complaint to respondent's law office address, 1533 St. Georges Avenue, Rahway, New Jersey 07065, by certified and regular mail.

According to the U.S. Postal Service (USPS), the certified envelope was delivered on December 24, 2011 at 1:53 p.m. The regular mail to respondent's address was not returned.

As of February 12, 2012, respondent had not filed an answer.

On a procedural note, on March 16, 2012, Office of Board Counsel (OBC) staff called respondent to determine if he had received the OBC materials sent to him on this default matter. Staff called the number for respondent's office and spoke with a "Claudette." The staff member was given respondent's cellular number.

Respondent answered staff's call to his cell phone. He was advised that OBC sometimes reaches out to a respondent if, within a set of multiple matters, such as here, the attorney

replies to some, but not all of the matters. In this instance, respondent filed answers to the complaints in DRB 12-080 and 12-092, but defaulted in this matter.

Respondent told staff that he was "generally aware" that there were ethics matters pending against him, but that he had not been focused on them. He stated that he suffers from advanced bone cancer, specifically "multiple myeloma," and is in a great deal of pain, especially when he moves, because it is "in his joints." He added that he required hospitalizations during the 2011 Thanksgiving holiday, during the Christmas holidays, and on January 6, 2012. He did not indicate the duration of those hospitalizations. He stated that he was sorry for not being "as focused as [he] should have been" on the ethics matters, given his poor health.

Respondent was advised that he still had time until April 7, 2012 to file a motion to vacate the default, if he wished to do so, and that he could call if he had any questions or concerns.

The OBC records indicate that the default materials sent to respondent's office address were delivered on March 26, 2012. The OBC received the signed certified mail return receipt card on March 28, 2012. The signature is illegible.

Respondent did not file a motion to vacate the default.[7]

According to the complaint, on May 26, 2011, at a time when respondent was suspended for failure to comply with a fee arbitration determination, he called the law offices of Mason, Griffin & Pierson of Princeton, New Jersey (MG&P), and improperly represented that he was an attorney authorized to practice law in New Jersey, with an interest in the matter of Rankin v. Township of Delaware Committee.

Citing sources at MG&P, the complaint alleged that, on March 26, 2011, respondent left the following message for one of the attorneys at that firm:

> Hi my name is Ben Payton, I am an attorney. I am calling on behalf of Rankin v. Township of Delaware Committee. My number is 732-388-1094. If you can give me a call as soon as possible I would certainly appreciate that. Again, my name is Ben Payton and the matter again is Rankin v. Township of Delaware Committee. Thank you.
>
> [C¶2.][8]

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[7] At oral argument before us, respondent was represented in the two preceding matters by his wife, Queen E. Payton. When asked if she was aware of the default matter, she stated that she was not.

The complaint noted, in a footnote to the quoted message, that the reference to the telephone number is that of respondent's law office, as he reported in his attorney registration form, as of April 5, 2011.

Service of process was properly made in this matter. Although the allegations of a complaint are deemed admitted when a respondent does not file an answer (R. 1:20-4(f)(1)), the facts recited in the complaint do not support the charges of unethical conduct.

The OAE's case rests on the telephone message left by respondent for an attorney at the MG&P law firm. In it, respondent identified himself: "Hi my name is Ben Payton", stating, "I am an attorney," which he is, albeit, a suspended one. He then said that he was "calling on behalf of Rankin v. Township of Delaware Committee." He left his office telephone number and asked the recipient to "give me a call as soon as

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(footnote cont'd)

[8] "C" refers to the formal ethics complaint.

possible I would certainly appreciate that." He then repeated, "Again, my name is Ben Payton and the matter again is Rankin v. Township of Delaware Committee. Thank you."

Nowhere is there a statement that respondent represented a party or was calling on behalf of a client. He stated that he was calling regarding the specific matter, but it could have been for any reason, for example, that he was suspended and could not take some sort of action that an eligible attorney could take. There are no exhibits that shed light on the meaning of respondent's message. We are left to review the matter within the four corners of the complaint.

Because the single-paragraph telephone message does not provide clear and convincing evidence that respondent's call was in the exercise of his suspended license to practice law, we determine to dismiss the charges that he violated R. 1:20-16(i) more appropriately, RPC 5.5(a) (unauthorized practice of law), RPC 8.4 (c)(conduct involving fraud, dishonesty, deceit and misrepresentation), and RPC 8.4(d) (conduct prejudicial to the administration of justice).

Nevertheless, respondent failed to file an answer to the complaint, allowing it to proceed to us as a default. Although the complaint did not include a charged violation of RPC 8.1(b),

the duty to file an answer is an implicit one. Respondent's failure to do so violated that rule.

In summary, in two matters, DRB 12-080 (Church of the Good Shepherd) and DRB 12-092 (Lesniak), respondent is guilty of gross neglect (RPC 1.1(a)), lack of diligence (RPC 1.3), and failure to communicate with the client (RPC 1.4(b)). In addition, when respondent's gross neglect in these matters is combined with instances of gross neglect in respondent's prior discipline matters, a pattern of neglect emerges. Therefore, we find that respondent violated RPC 1.1(b) as well.

In the default matter, we determine to dismiss the underlying charges, leaving only respondent's failure to file an answer to the ethics complaint, a violation of RPC 8.1(b).

Conduct involving gross neglect and lack of diligence, even when combined with other infractions, such as failure to communicate with clients, ordinarily results in an admonition. See, e.g., In re Russell, 201 N.J. 409 (2009); In the Matter of Keith T. Smith, DRB 08-187 (October 1, 2008); and In re Dargay, 188 N.J. 273 (2006).

If, as is the case here, the attorney is also guilty of a pattern of neglect, a reprimand ordinarily ensues. See, e.g., In re Weiss, 173 N.J. 323 (2002) (lack of diligence, gross neglect,

and pattern of neglect); In re Balint, 170 N.J. 198 (2001) (in three matters, attorney engaged in lack of diligence, gross neglect, pattern of neglect, failure to communicate with clients, and failure to expedite litigation); and In re Bennett, 164 N.J. 340 (2000) (lack of diligence, failure to communicate in a number of cases handled on behalf of an insurance company, gross neglect, and pattern of neglect).

Here, respondent also failed to cooperate with disciplinary authorities, for which admonitions are routinely imposed. See, e.g., In re Ventura, 183 N.J. 226 (2005); In the Matter of Kevin R. Shannon, DRB 04-152 (June 22, 2004); and In the Matter of Keith O. D. Moses, DRB 02-248 (October 23, 2002). In Ventura, the attorney failed to file an answer to an ethics complaint charging her with a single instance of failure to cooperate with an ethics investigation (RPC 8.1(b)). Ventura then defaulted. We voted for a reprimand, reasoning that the ordinarily appropriate admonition for failure to cooperate with ethics authorities should be enhanced because of the default. The Court rejected the reprimand and entered an order for an admonition.

Here, and notwithstanding respondent's failure to file an answer in the default matter, he did not "thumb his nose" at the disciplinary system, when he defaulted. Rather his serious

illness seems to be responsible for his inattention to the complaint. We, thus, determine to add no additional discipline for this lapse.

With regard to mitigation, respondent has provided some evidence that both he and his wife have suffered illnesses and that he continues to suffer from heart disease and cancer. In respondent's case, cancer is in his bones. He also claims to have cognitive issues resulting from a lack of oxygen to his brain, during a heart attack. We do not disbelieve respondent with respect to any of his medical claims, despite the fairly limited medical records provided. However, respondent's health issues occurred in 2009, well after the representations were completed in these matters. His ill health does not help to explain or mitigate his misconduct in the Church of the Good Shepherd and Lesniak matters.

Respondent's medical information may, however, explain some of the difficulty that he had at the 2011 DEC hearings, when recounting details of his handling of those underlying matters. As noted earlier, we also considered his health condition as a factor in his failure to file an answer to the complaint in the default matter.

In aggravation, however, respondent has a lengthy disciplinary record since his admission to the bar, in 1992: an October 27, 1997 admonition; a March 7, 2001 reprimand; two three-month suspensions that ran concurrently, effective July 17, 2001 — a June 22, 2001 three-month suspension in a default matter and an April 30, 2002 three-month suspension; and a July 14, 2011 censure. He is currently temporarily suspended for failure to comply with a fee arbitration award.

Such significant prior discipline merits application of the progressive discipline principle, because respondent has apparently failed to learn from prior mistakes. The infractions presented in these three matters — two instances each of gross neglect, lack of diligence and failure to communicate with the client; a pattern of neglect; and one instance of failure to cooperate with disciplinary authorities are also found in four of respondent's prior disciplinary matters: the October 27, 1997 admonition involved misconduct in a 1993 client matter (gross neglect, lack of diligence, and failure to communicate with the client in one matter); the March 7, 2001 reprimand matter involved misconduct spanning 1996 to 1999 (gross neglect, failure to communicate with the clients, and failure to cooperate with the investigation of two grievances); the June

22, 2001 three-month suspension in a default matter involved misconduct spanning 1995 to 1999 (gross neglect, lack of diligence, failure to communicate with clients; other infractions present); and the April 30, 2002 three-month suspension matter involved misconduct from August to September 1998 (failure to communicate with the client; other infractions present).

Therefore, while a reprimand would ordinarily suit a run-of-the-mill case involving pattern of neglect as in Weiss, Balint, and Bennett, a significant upward departure is still warranted here, in light of respondent's ethics history.

Respondent previously received two concurrent three-month suspensions for the same type of misconduct, displayed over a long period of time (1995 to 1999). Progressive discipline does not apply if the similar misconduct takes place at about the same time, but the disciplinary matters are heard separately. See, e.g., In re Hediger, 197 N.J. 21 (2008) (attorney's conduct that led to two censures occurred during the same time frame as the conduct in a subsequent disciplinary matter and involved violations similar in nature; therefore, the attorney received only a reprimand).

That cannot be said here. The misconduct in the Church of the Good Shepherd and Lesniak matters occurred in 2008 to 2009, six years after respondent's reinstatement from the earlier suspensions. It appears, thus, that respondent had not learned from the prior mistakes made in those matters.

We determine that the imposition of a three to six-month suspension is the appropriate range of discipline for respondent's misconduct. However, given respondent's considerable health-related mitigation, we determine that a prospective three-month suspension adequately addresses the total misconduct here.

In addition, based on respondent's claimed cognitive deficiencies, we require him to provide proof of fitness to practice law, when he applies for reinstatement, as attested by a qualified health professional approved by the OAE. In addition, we require respondent, upon reinstatement, to practice under the supervision of a proctor other than his wife, for a period of two years.

Member Baugh did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matters of Ben W. Payton

Docket No.: DRB 12-046
Decided: August 15, 2012

Docket Nos: DRB 12-080 and DRB 12-092
Argued: April 19, 2012
Decided: August 15, 2012

Disposition: Three-month prospective suspension

Members	Disbar	Three-month Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh						X
Clark		X				
Doremus		X				
Gallipoli		X				
Yamner		X				
Wissinger		X				
Zmirich		X				
Total:		8				1

Julianne K. DeCore
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Chief Counsel